

Security - 2
ERB

OGC Has Reviewed

30 September 1954

MEMORANDUM FOR THE RECORD

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SUBJECT: Security Case Under [REDACTED]

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1. Examination of the proceedings to date in a recent security case discloses two defects. The more serious relates to the suspension of the employee which purported to be pursuant to [REDACTED]. This Regulation provides that prior to the suspension of an employee, the case will be submitted to the Employment Review Board which will "make a preliminary review to determine if there is sufficient evidence to warrant formal Board proceedings and recommendations to the Director." In the subject case, however, notice of suspension, sent under date of July 19, 1954 to the employee by the Acting Assistant Director for Personnel, was based only on a memorandum recommending suspension to the Director of Central Intelligence from the Director of Security which apparently was approved by the Director of Central Intelligence.

2. A panel was appointed to consider this case by memorandum of the Deputy Director (Administration), dated July 30, 1954. The panel's first meeting took place on August 4, at which a summary of derogatory information from the Director of Security was presented to the Board. However, the Board was expressly requested to "pend" any formal action on the case for thirty days in order to allow additional investigations of the employee to be completed. The memorandum of August 1, therefore, was not put into the record and the then existing files concerning the employee were not submitted to the Board to avoid prejudice since non-derogatory information was not then offered.

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3. Under [REDACTED] employees are entitled to consideration by an impartial panel of any evidence tending to indicate that they are or may be security risks and a determination by such panel that the evidence presented warrants suspension. This right has been denied to the subject employee; nevertheless, he has been informed that his suspension was pursuant to [REDACTED]

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4. Under Section 102c of the National Security Act of 1947 the Director of Central Intelligence was given discretionary authority to terminate the employment of any employee in the interest of the United States. However, [REDACTED] expressly establishes an Employment

Review Board "to provide an impartial review, and advise the Director in the just and equitable exercise of his discretionary power under the Act."

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5. The question then arises as to whether or not the Director is bound by [redacted]. In my opinion, both as a matter of law and policy, he is. In the case of Alexiou v. McGrath, 101 Fed. Supp. 421 (1951), the Attorney General had by regulation provided a quasi-judicial procedure to advise him in the exercise of his statutory authority to suspend the deportation of aliens in certain circumstances. The plaintiff in this case was ordered to be deported and requested a hearing which resulted in a negative decision which decision in turn was affirmed by the Acting Commissioner of Immigration. Plaintiff took an appeal to the Board of Immigration Appeals which reversed the decision of the Acting Commissioner of Immigration on the grounds that evidence had been considered by the Acting Commissioner which was not of record. The Attorney General approved the decision of the Board of Immigration Appeals but subsequently withdrew his approval. The Court found that, on its face, the first decision of the Attorney General was not in accord with the regulations which had the force and effect of law, stating:

"Once the Attorney General has established the procedure affording an opportunity for a fair hearing as has been done here, then I do not believe his discretion can be exercised arbitrarily or capriciously in complete disregard of what appears on the record."

6. There is a technical distinction between the Alexiou case and the subject case in that the Attorney General possesses clear statutory authority to establish "regulations not inconsistent with law for the government of his department, . . . and performance of its business . . ." (5 U.S.C. 22). I have not found express statutory authority in the Director of Central Intelligence to issue regulations under Section 102c of the National Security Act of 1947. However, it is obvious that the head of any organization, whether Governmental or private, must have implied authority to regulate the conduct of his organization. There are many cases and Comptroller General decisions to the effect that regulations including those for the internal government of the department or agency concerned which regulations are authorized by law and not inconsistent with law have the force and effect of law. No cases or decisions have been found bearing on the effect of regulations issued in the absence of express legislative authority. However, it would seem in principle that regulations for the internal management of an organization must be considered to have legal effect on the basis of such implied authority. In any event, the Director of Central Intelligence could not be heard to deny his own authority to issue regulations which he has in fact issued. In my opinion, therefore, the rationale of the Alexiou case applies in

this situation. It follows, therefore, that the suspension of subject employee was improper for lack of prior consideration of the material evidence by an impartial panel.

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7. Even though a possibility exists that a claim by the employee concerned could be successfully resisted in a court of competent jurisdiction, the desirability of permitting this case to reach a court seems questionable. Since subject employee's suspension was not in accordance with [REDACTED] it would appear that he is entitled to and should receive re-credit of annual leave used since July 19, 1954, and if his leave was exhausted between that date and the present, he is entitled to compensation for the period after the expiration of his leave. In the circumstances it would seem desirable to convene a meeting of a panel pursuant to [REDACTED] to consider whether or not sufficient evidence exists to warrant suspension of subject employee.

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8. The second defect in the procedure followed in the subject case is that the panel was designated by the Deputy Director (Administration), whereas Section C3 of [REDACTED] as amended provides for the designation of panels by the Assistant Director for Personnel or the Deputy Assistant Director for Personnel in the absence of the chairman. Since the suspension of the subject employee was invalid under [REDACTED] it is unnecessary to consider the legal effect of improper designation of the panel. In connection with the convening of a panel referred to in Paragraph 7, it is recommended that such a panel be designated by the chairman, Employee Review Board, or in his absence by the Assistant or Deputy Assistant for Personnel.

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C.F.B.

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legal
vital
signer